Filed 12/19/16 Rivera v. Foster Farms CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

RUTH RIVERA et al., Plaintiffs and Appellants, v. FOSTER FARMS, Defendant and Respondent.	B264137 (Los Angeles County Super. Ct. No. BC531764)

APPEAL from a judgment of the Superior Court of Los Angeles County, William F. Fahey, Judge. Affirmed.

Greene, Broillet & Wheeler, Browne Greene; Balaban & Spielberger, Daniel Balaban, Andrew J. Spielberger, Paymon A. Khatibi; Esner, Chang & Boyer, Holly N. Boyer, Shea S. Murphy, and Joseph S. Persoff for Plaintiffs and Appellants.

Archer Norris, Kenneth C. Ward, Sharon C. Collier; Mayer Brown, Donald M. Falk and Carl J. Summers for Defendant and Respondent.

Ruth Rivera (Rivera) developed Guillain-Barré syndrome, which permanently impaired her ability to walk and use her hands, after contracting a bacterial infection. Rivera and her husband (plaintiffs) sued Foster Farms (defendant) asserting the infection, and thus her injuries from Guillain-Barré, were attributable to Foster Farms chicken she ate. A jury concluded otherwise, finding Rivera's infection did not come from Foster Farms chicken. We consider whether the trial court's jury selection process deviated from proper procedure and whether several of the jurors ultimately empanelled engaged in misconduct warranting reversal. We also decide whether the court erroneously excluded evidence of (1) *Salmonella* contamination in defendant's facilities, and (2) inspection reports citing defendant for noncompliance with federal agricultural standards governing chicken processing.

I. BACKGROUND

A. Undisputed Facts and Plaintiffs' Lawsuit

Rivera, who was 43 at the time of trial, was married to Leo Lopez, with whom she had two children, an 11-year-old son and a five-year-old daughter.

In late December 2011, Rivera developed diarrhea and other symptoms after she cooked chicken for herself to eat. When she woke on January 2, 2012, Rivera found she could not move one of her hands. She checked into a hospital later that day after she had trouble standing and felt a heaviness in her arm. Rivera was diagnosed with Guillain-Barré syndrome, specifically, the variant known as acute motor axonal neuropathy.

Campylobacter jejuni (hereafter, *Campylobacter*) infections are known to cause Guillain-Barré syndrome, particularly its

axonal form, and doctors agreed Rivera developed her case of Guillain-Barré from a *Campylobacter* infection. Most *Campylobacter* infections arise from exposure to chicken.

Rivera's Guillain-Barré syndrome permanently weakened her limbs and impaired her motor functions, resulting in limited use of her hands and an inability to walk without the assistance of either braces and crutches or a walker. Plaintiffs filed suit in December 2013, and their later-filed First Amended Complaint asserted causes of action against defendant for strict products liability, breach of warranty, negligence, negligence per se, and loss of consortium. Plaintiffs alleged defendant's chicken caused Rivera's illness and defendant had intentionally manufactured and marketed chicken products it knew carried an increased risk of *Campylobacter* contamination.

B. Trial

1. Jury selection

Immediately prior to beginning jury selection, the court advised counsel on how it intended to proceed: "Now, we are going to tell them [the prospective jurors] this is an approximate two-week trial, which may for some be a little bit of a hardship. But I've now reviewed the list that we've received, and I noted that there's at least 14 of them who have unlimited jury time and/or ten days of jury service available. So we're going to start with that group of 14 and add a couple more. [¶] . . . [¶] We were not able in the short time since our last [final status conference] to have a qualified jury pool. So this is, in my estimation, the second best way to go. We're going to use this list and start with the people who are most qualified. [¶] And then we'll have to, depending on the outcome of challenges, dip into folks who

unfortunately, in today's day and age, don't have paid leave . . . ."[1] Plaintiffs' counsel objected to proceeding through the juror panel in that fashion: "[A]s to the randomized list, we think that is objectionable under the Code. I've tried cases a number of years. I've never seen it done any other way than through a randomized list, your Honor. I do not have a Code citation to exert, but it seems to me to be untoward." The court overruled the objection, stating, "I've looked into it. I found no prohibition, and I think the court enjoys wide latitude in calling forward names of jurors who have otherwise been randomly selected."

Later that day, while jury selection was still ongoing, plaintiffs' counsel reiterated the objection, pointing to Code of Civil Procedure sections 191 and 194, which defined the court's obligation to select a jury at random. The court again overruled the objection, stating: "As I've indicated before, we did start[ ] with the random list and took it to the next level. Nothing in the statutes I've reviewed or any authorities that were just quoted by plaintiffs' counsel causes me to believe that there is something improper about jury selection in this fashion. So, you've made your record and that will be the rule."

The first 14 potential jurors called during voir dire (those having at least 10 days of service time available) consisted of a nurse, two attorneys, a software engineer, four current or retired homemakers, two students, two executives in the entertainment industry, a pastor, and a dishwasher/housekeeper. Of those 14,

---

[1] The initial juror list comprised 45 prospective juror names. A copy of the list itself is not included in the record, nor is there any information in the record about how the list of 45 was compiled.

five were ultimately chosen to serve: the two entertainment executives (Passaseo and La Grua), one student, the dishwasher/housekeeper (Miranda), and one homemaker (Fischbach). After further voir dire, the court filled the rest of the 12-member jury with a retired computer programmer and systems analyst (Griffith), a receptionist, an architect (Didvar-Saadi), a makeup artist, a student and retail worker (De Santos), another student (Martinez), and a mental-health case manager.

During voir dire, the parties stipulated the court should excuse two potential jurors whose English comprehension appeared poor. The court also expressed concern about the language skills of juror Miranda, who told the court she "underst[oo]d little English." The court asked her to read from the list of the court's voir dire questions, which Miranda appeared able to do, as well as to answer those questions when asked by the court. Counsel for the parties did not ask Miranda additional questions relating to her language comprehension, nor did either party challenge her for cause or excuse her by way of a peremptory challenge.

Proceeding to the selection of alternates, the court first examined two potential alternates, a plumber and a retired contractor who expressed an opinion that people were generally too quick to sue. The court then examined two additional potential alternates. The first (Easton) had grown up in Japan and said she "ha[d] a very different feeling towards the American [judicial] system," with the implication being her feelings were negative. She also said she had a "weakness" in seeing Rivera "not capable to do everything . . . ." Easton said she "want[ed] to be fair as much as possible" and she "[could] try, but it [would be] hard." Plaintiffs' counsel questioned Easton further about the

views she expressed. Easton said she had "a very, very deep sympathy towards [Rivera]" but also that she was "not raise[d] to blame lots of things to the other," and she would hesitate to sue a company like Foster Farms even if she believed she or a family member were sickened by eating its chicken.

The court told counsel they each had one peremptory challenge to use on either of the first two prospective alternate jurors examined. After plaintiffs' counsel challenged the retired contractor, the court seated Easton as the second alternate. Plaintiffs' counsel then asked whether he could use another peremptory, and the court responded counsel could not because he had just "one challenge total." Plaintiffs' counsel did not object.

The next day, before either party presented its opening statement, the court told the parties two jurors had experienced medical issues requiring their dismissal. Thus, the two alternates, one of whom was Easton, were seated as part of the 12-member jury and no additional alternates remained.

2. In limine motion regarding Salmonella

Prior to trial, defendant moved in limine to exclude all evidence of its alleged misconduct pertaining to a *Salmonella* outbreak in its facilities in 2013 and 2014, more than a year after Rivera first became ill. Defendant argued the *Salmonella* episode was irrelevant to plaintiffs' case because it occurred after Rivera contracted *Campylobacter* and because scientific studies showed little correlation between the conditions for colonization and transmittal of the *Salmonella* and *Campylobacter* bacteria. Defendant also argued the evidence was impermissible character evidence prohibited under Evidence Code section 1101,

subdivision (a).[2] Plaintiffs responded the evidence was relevant and admissible as to its claim for punitive damages and the issue of how defendant operated its plants. The trial court granted defendant's motion and excluded the *Salmonella* evidence.[3]

3. Evidentiary issues during trial

At multiple points during trial, plaintiffs sought to offer evidence relating to noncompliance reports the United States Department of Agriculture (USDA) issued to defendant regarding its plant operations. At the beginning of trial, plaintiffs submitted a brief arguing noncompliance reports produced by defendant in discovery were admissible. The brief attached five such reports that the USDA had issued to defendant: (1) a report dated December 29 or 30, 2011, that documented a machine for spraying chickens with "Cecure" antimicrobial agent had been turned off in October and December of that year, allowing chickens to pass through the machine without being treated; (2) a report dated June 15, 2011, that documented a chicken product had been adulterated but was nevertheless packaged and was ready for shipment; (3) a report dated April 25, 2011, that documented a carcass containing visible fecal material was seen just before it was to enter the cooling tank; (4) a report dated January 23, 2011, that stated an inspector purchased a cup of

---

[2] This provision makes evidence of a company's "character" inadmissible where it is offered to show the company performed in a particular way on a specific occasion.

[3] The ruling is memorialized in a minute order, but there are no other documents in the record on appeal that shed light on the court's reasoning.

coffee from a plant vending machine and found a cockroach floating in the cup; and (5) a report dated December 22, 2011, that indicated a plant worker gathered chicken wings on the floor with her boots and then placed the wings on a cart for reprocessing.[4]

Defendant objected to admission of the reports, arguing they were irrelevant to the matters at trial, they did not meet the standard of official government records so as to be excluded from the hearsay rule, they were preliminary and incomplete documents that did not constitute final USDA determinations, and their probative value, if any, was substantially outweighed by their prejudicial effect.

The trial court sustained defendant's objections, finding the copies plaintiffs provided were incomplete (e.g., failed to include attachments with defendant's response to the cited deficiencies) and contained discrepancies as to dates. The court indicated it would revisit the reports' admissibility if plaintiffs could establish a proper foundation at the appropriate time during trial, but the court stated it would under no circumstances admit records relating to *Salmonella* or "generic cleanliness in the plant, including cockroaches," which the court believed were inadmissible under Evidence Code section 352.

Two days later, plaintiffs again sought to admit the USDA noncompliance reports, this time identifying four specific reports

---

[4] The reports plaintiffs submitted were part of an exhibit that was nearly 800 pages long. Plaintiffs told the court they intended to introduce only a portion of the exhibit and that the reports they provided were meant as "examples of the type of issues" they planned to raise.

they wished to use at trial: two they had provided earlier that referred to the antimicrobial machine being turned off and the worker gathering wings with her boots, and two additional reports, one of which documented fecal material found on a carcass caused by a deficient probe, and another that documented "an excessive number of missing viscera" (i.e., soft internal organs) from chickens as they were processed down the line. Plaintiffs argued these reports should be admitted because their expert would link defendant's failure to adequately treat bacteria in its chickens and unsanitary conditions in its plants to an increased presence of *Campylobacter*. Plaintiffs also argued defendant had "opened the door" to admission of the reports by eliciting testimony that suggested the USDA would have shut down its facilities if they were unsanitary.

Defendant again objected to admission of the reports, arguing they were irrelevant, unduly prejudicial, and risked confusing the jury. The trial court sustained defendant's objections, and excluded the reports for three reasons: (1) they remained incomplete and were not linked to any particular exhibit to be offered; (2) they set forth conclusions of the citing inspectors reached without a hearing or adjudication, which might confuse the issues and lead jurors to believe the reports reflected an ultimate conclusion of law, namely, that defendant violated federal regulations; and (3) they did not go directly to the critical issue in the case.

Ultimately, however, the court did permit plaintiffs to present some of the noncompliance-report evidence. After a defense witness testified about defendant's use of Cecure antimicrobial treatments, the court allowed plaintiffs to cross-examine the witness with the noncompliance report showing the

Cecure machine had been turned off in both October and December 2011. In addition, the court allowed plaintiffs to elicit testimony from a defense witness about excessive numbers of missing viscera in chickens processed by defendant, which was the basis for another of the noncompliance reports plaintiffs had earlier sought to admit.

4. Presentation of evidence: plaintiffs' case

Plaintiffs' case was largely based on Rivera's description of what she ate when, the timing of the symptoms she later experienced, and additional expert testimony regarding the likely cause of her illness and her future prognosis.

Rivera testified she shopped at three markets near her house and always bought Foster Farms chicken.[5] She bought chicken parts, which she then separated into portions and froze to prepare as needed, which was generally sometime in the week after she made the purchase. Rivera said she never ate raw chicken and usually cut into it to ensure there were no "pink spots." The Foster Farms chicken products sold by the stores Rivera frequented came from two processing plants, "Livingston" and "Cherry Street," and the chicken typically had a 10-day use-or-freeze shelf life.

On December 26, 2011, Rivera made lunch for herself by sautéing chicken she had earlier bought and frozen. She was the only person in her family to eat chicken that day. Rivera had diarrhea the following day, and either that same day or the next,

---

[5] Rivera testified in Spanish, and an interpreter translated her testimony. The court instructed the jurors to rely solely on the translator, even if they understood Spanish.

she felt as though she was coming down with a bad flu. Rivera was well enough to dance at a New Year's Eve party at her house, but she was admitted to a hospital on January 2. Rivera spent approximately three weeks in intensive care, and she then underwent rehabilitation at another medical facility for almost a month.

Experts for plaintiffs testified *Campylobacter* infections are most often caused by exposure to chicken. According to the experts, symptoms of such an infection typically arise one to seven days after exposure, and the infections are what cause the axonal form of Guillain-Barré syndrome in 67 to 75 percent of patients who contract it. Plaintiffs' experts opined, given the timeline of Rivera's symptoms and diagnosis, she likely developed Guillain-Barré from a *Campylobacter* infection caused by exposure to chicken one to seven days prior to December 27 or 28 (the point at which Rivera first started to have symptoms). That conclusion was consistent with evidence Rivera ate chicken on December 26 and experienced symptoms of gastrointestinal illness over the next two days.

Plaintiffs also offered evidence intended to show defendant did not take adequate steps to reduce the risk its chicken would cause *Campylobacter* infections. Defendant began internally testing its chicken for *Campylobacter* in 2010, after the USDA indicated it would develop performance standards to test chickens for the presence of *Campylobacter*. In 2011, the USDA required chicken processing plants to show *Campylobacter* levels below 10.4 percent in order to be considered "under control." The USDA did not begin testing and rating facilities under that standard until 2012. In 2011, defendant's internal testing showed average *Campylobacter* levels of 6.07 percent at its

Livingston plant. In the last two weeks of December 2011, however, *Campylobacter* levels at that plant were measured at over 12 and 13 percent,[6] and a level as high as 36 percent had been measured at one point earlier that same year.

5. Plaintiffs agree to proceed with an 11-member jury

After plaintiffs presented about three-quarters of their case-in-chief, the trial court received information that one of the jurors had passed a note to another juror suggesting how the juror should vote in the case. The court interviewed the juror in question who said she favored plaintiffs and believed from their statistical evidence that Rivera's infection was likely caused by defendant's chicken. The court excused the juror, concluding she could not be fair because she had shifted the burden of proof to the defense, ignored the court's instructions, and admitted her sympathy for plaintiffs would influence her decision.

That left just 11 people on the jury, and the court offered the parties the option of declaring a mistrial or proceeding with 11 jurors, which would necessitate the agreement of eight to reach a verdict. The parties stipulated to proceeding with 11 jurors.

---

[6] The obvious suggestion was that, given the likely time such chickens were delivered to market, Rivera might have purchased chicken that was more likely than usual to have been infected with *Campylobacter*.

6. Presentation of evidence: defendant's case

Defendant offered evidence to prove its chicken was not the source of Rivera's illness and that it took adequate steps to protect the public from *Campylobacter*. The defense presented evidence to establish Rivera had no receipts showing she had purchased Foster Farms chicken, defendant's pre-packaged chicken represented 10 percent or less of the chicken sold at the stores where Rivera shopped, and Rivera had eaten foods other than chicken that could have infected her with *Campylobacter*. The defense also maintained that the various (and at times inconsistent) dates Rivera identified as the point at which she developed gastrointestinal and neurological symptoms called into question whether what she ate on December 26 could have caused her Guillain-Barré.

On the issue of defendant's efforts to reduce *Campylobacter* in its chicken, defense witnesses testified the company used "state of the art" antimicrobial systems to treat its chickens and USDA inspectors continuously monitored its operations. Defense counsel also elicited testimony that it was impossible for a chicken processor to completely eliminate the risk of infection. Regarding the adequacy of its testing for bacteria, the defense introduced evidence to show it applied the same methods as the USDA when conducting its internal tests for *Campylobacter* and it had met all USDA performance standards and compliance requirements relating to *Campylobacter*. The defense also emphasized that the risk of contracting a *Campylobacter* infection could be dramatically reduced or eliminated by proper handling and cooking.

C. Instructions and Verdict

The court instructed the jurors at the close of the evidence not to be influenced by bias, to follow the law as presented by the court even if they disagreed with it, not to consider as evidence anything they saw or heard when the trial was not in session, including their "unique personal experience," and not to retranslate any testimony for other jurors. The court further instructed the jury that in contrast to criminal trials, the party which has the burden to prove a fact in a civil trial "need prove only that it is more likely to be true than not true" and the jury could consider evidence in the form of testimony, exhibits, or opinions.

The jury was given a special verdict form and directed to answer the questions sequentially, noting the composition of their vote on each issue. The first question read, "Did Ruth Rivera's Campylobacter infection come from Foster Farms' chicken?"[7] By a vote of eight to three, the jury answered no. Based on that finding, the jury refrained from answering further questions and judgment was entered for defendant on all of plaintiffs' causes of action.

D. New Trial Motion

Plaintiffs moved for a new trial arguing, among other things: (1) the court's selection of the first 14 potential jurors was

---

[7] Subsequent questions on the special verdict form, which the jury did not answer in light of its answer to question one, were tailored to the causes of action in the First Amended Complaint and asked, among other things, "was [defendant] negligent" and "did the chicken contain a manufacturing defect when it left [defendant's] possession?"

not at random and the process used unconstitutionally excluded jurors on the basis of socioeconomic class, and (2) juror misconduct deprived plaintiffs of a fair trial. (Both arguments are plaintiffs' principal grounds for seeking reversal on appeal.)

In support of their argument that the jury selection process was unconstitutional, plaintiffs submitted a declaration from statistician William Fairley (Fairley) that explained the statistical concept of randomness and concluded the trial court's method of preselecting the first 14 potential jurors to be examined was "not a random sample because it was not selected by a random procedure." Fairley opined that a "random procedure is expected to generate a fair cross section of the population, whereas the subset of that group selected by [the trial court] would appear, for example, to be biased towards employees of larger companies, and towards retired persons." Accordingly, Fairley concluded the jury selection process was "biased" in a statistical sense, namely, that it could not be assured "the expected proportion in the sample selection of any characteristic in the population is equal to the actual proportion of that characteristic in the population." Plaintiffs also argued the trial court erred by allotting them only one, rather than two, peremptory challenges to the prospective alternate jurors, in violation of Code of Civil Procedure section 234.[8]

As to the juror misconduct claim, plaintiffs asserted several of the jurors had engaged in misconduct. They argued juror Passaseo translated and interpreted evidence and juror

---

[8] The statute states "each side . . . shall be entitled to as many peremptory challenges to the alternate jurors as there are alternate jurors called."

discussions from English to Spanish to juror Miranda, who could not sufficiently understand English to render a verdict. Plaintiffs argued jury foreperson La Grua did not allow the jurors to look at the jury instructions and incorrectly told them defendant was not liable unless plaintiffs proved their claims "100 [percent]" with "hard evidence." Plaintiffs contended juror Fischbach told the other jurors her daughter contracted a *Campylobacter* infection in Mexico and Rivera was therefore lying about how she obtained her infection. In addition, plaintiffs claimed "Juror Miranda, Juror Passaseo and others regularly discussed the case over lunch" before deliberations began and outside the presence of other jurors. And plaintiffs asserted juror Easton (the juror who grew up in Japan) engaged in misconduct because she told the other jurors it was wrong to sue and plaintiffs were only doing so to make money.

Plaintiffs submitted declarations from five jurors in support of their juror misconduct claims.[9] Juror Miranda declared she understood approximately 50 percent of the trial testimony and, during deliberations, "was unable to understand most of the discussions or the evidence submitted to [the jury]."[10] According to juror Miranda's declaration, juror Passaseo "translated the testimony and the evidence" at lunchtime during the trial, as well

---

[9] Three out of plaintiffs' five declarants voted in favor of plaintiffs on the issue of whether defendant's chicken caused her infection. The other two, Miranda and Martinez, had voted against plaintiffs.

[10] As typed, the declaration stated she understood only 10 percent of the testimony; Miranda crossed this out and wrote in 50 percent.

as questions, answers, and discussions during jury deliberations. The other declarations plaintiffs submitted similarly stated Passaseo translated for Miranda and asserted Miranda appeared to understand little to no English. The other declarants also reported Passaseo translated evidence for juror Fischbach too.

Declarations plaintiffs submitted from Martinez, De Santos, and Didvar-Saadi stated foreperson La Grua told the jurors plaintiffs needed to provide "hard evidence," that it had to be "100 [percent]," and Rivera's testimony was not hard evidence. Juror Griffith said that when he challenged La Grua's characterization of the standard of proof, La Grua responded that Rivera's testimony "might be evidence but it is not proof." According to Griffith, several jurors said they "believed [Rivera's] testimony but accepted [La Grua's] argument that her testimony was not proof." Four of plaintiffs' declarants said La Grua would not allow the jurors to see the court's instructions and told them he would interpret the instructions for everyone.

The declarations from Martinez, De Santos, Didvar-Saadi, and Griffith also included statements concerning juror Fischbach, specifically, that she told the others that her daughter contracted *Campylobacter* in Mexico and that, in her view, Rivera was not credible because she could have been infected "anywhere." The four declarants also said juror Easton announced her intention not to vote for plaintiffs before deliberations began and told the other jurors she believed plaintiffs were suing only for financial gain. Similarly, the declarations from Martinez and Didvar-Saadi claimed juror Fischbach stated, prior to the start of deliberations, that she would not support plaintiffs.

Defendant opposed plaintiffs' motion for a new trial. Defendant maintained the court's selection of the jury conformed

to applicable law and was harmless in any event. Defendant also opposed the juror misconduct claims and argued: juror Miranda adequately understood English and plaintiffs had forfeited any challenge on that basis by failing to object to her initial placement on the jury; foreperson La Grua's statements about plaintiffs' burden of proof were part of the deliberative process and no jurors ever asked him for the court's instructions; and the claims concerning juror Fischbach and juror Easton did not warrant a new trial.

Defendant supported its opposition with counter-declarations from foreperson La Grua and juror Passaseo. La Grua said he read the court's instructions to the jury verbatim when deliberations began and would have given the instructions to any juror who asked, but none did. La Grua said he understood plaintiffs' burden was to prove defendant "more likely than not" caused their injuries and he did not tell the jurors otherwise. He did tell the other jurors he did not believe Rivera's testimony was sufficient to meet the burden of proof and he did use the term "hard evidence" in order to explain his view. La Grua also averred there were discussions with Miranda in Spanish during deliberations but a number of the jurors spoke Spanish and none indicated the discussions with Miranda were improper or a mischaracterization.

In her declaration, juror Passaseo said she did not translate any witness testimony for Miranda; rather, she merely explained some of the jury discussions to her in Spanish because they involved technical concepts. Passaseo also corroborated La Grua's assertion that he read the jury instructions to the panel word for word and that no jurors asked to see the instructions. In addition, Passaseo acknowledged she did have lunch with juror

Miranda during trial and the two made "a few comments about the case . . . but never to any level of detail." Passaseo declared she "followed the rules given to us."

To rebut plaintiffs' contention that jury selection was improper, defendant offered its own declaration from a statistician, Eugene Ericksen (Ericksen). He acknowledged the court's selection of the first 14 potential jurors "did create the possibility that the jury candidates among the preselected 14 would have a greater chance of actually serving on the jury than the remaining 31 candidates not identified by [the court]," but he opined the court's method did not "have any substantial impact on the actual composition of the jury." Ericksen reasoned that if jury selection had been entirely random, any subset of 14 jurors from the total list of 45 would likely have resulted in four or five being selected for service. Because five jurors were actually empanelled from the court's preselected group of 14, the court's "reshuffling of the order . . . did not increase the number of jurors selected from the 'pre-selected 14' beyond the expected range . . . ."

Once the competing declarations had been submitted, both sides moved to strike portions of the juror declarations as inadmissible. Defendant challenged portions of the declarations regarding juror Miranda's command of English, conversations held in Spanish during deliberations, foreman La Grua's statements and conduct, and juror Fischbach's statements about her daughter's *Campylobacter* infection. Plaintiffs, in turn, challenged certain of La Grua and Passaseo's statements that sought to explain their conduct.

After hearing argument from counsel, the trial court denied plaintiffs' new trial motion. The court ruled plaintiffs waived any

challenges to the selection and composition of the jury by stipulating to proceed with an 11-person jury rather than accepting the court's offer to declare a mistrial. The court also concluded the various allegations of jury misconduct did not warrant a new trial.

Specifically, the court found: (a) Passaseo's attempts to help Miranda understand the evidence were "quintessentially deliberative" and plaintiffs cited no case that prohibited a juror from assisting another juror in a different language; (b) La Grua's statements about plaintiffs' burden of proof were an expression of his personal viewpoint and part of the deliberative process, and in any event, there was no indication the jurors failed to follow the court's instructions as it read them to the jury; (c) comments about the case over lunch before deliberations began, reported to have occurred among Passaseo, Miranda, and Fischbach, were not sufficiently egregious to require a new trial; and (d) Fischbach's statement about her daughter's *Campylobacter* infection was harmless. The court further found plaintiffs were not entitled to relief based on their contention that Easton and Fischbach expressed a refusal to find in plaintiffs' behavior at the outset of deliberations.

In deciding the new trial motion, the trial court also expressly ruled on defendant's evidentiary objections to plaintiffs' juror declarations.[11] The court struck one paragraph in juror Miranda's declaration and substantial portions of the declarations of jurors Martinez, De Santos, and Didvar-Saadi. The court emphasized, however, that it would deny plaintiffs'

---

[11] The court did not expressly rule on plaintiffs' objections to defendant's juror declarations.

motion even if it considered their declarations in full. The court explained that it "fe[lt] strongly that this is a case where it was an aggressive [plaintiffs'] investigator who perhaps unfairly preyed on impressionable younger jurors to try to get them to second guess their verdict . . . ."

II. DISCUSSION

The conduct of the trial judge and the jurors in this case does not warrant reversal. Although the trial court did deviate from the customary procedure for seating jurors, plaintiffs have not established the trial court's process materially departed from what the law requires and deprived them of a jury drawn from a representative cross-section of the community. Plaintiffs' juror misconduct contentions are well argued, particularly concerning pre-deliberation communication between jurors Passaseo and Miranda, but we see no basis for reversal when we give, as we must, appropriate deference to trial court's determinations on issues of fact and credibility. We also hold the trial court did not abuse its discretion in excluding certain of the USDA noncompliance reports and evidence of *Salmonella* contamination.

A. Jury Selection Process

The parties in a civil jury trial are constitutionally entitled to have their case tried before a jury selected from a representative cross-section of the community. (See *Holley v. J & S Sweeping Co.* (1983) 143 Cal.App.3d 588, 592-593; see also *Di Donato v. Santini* (1991) 232 Cal.App.3d 721, 734-735.) Although a party is not entitled to a jury that actually represents all distinct groups in the community, "there should be no systematic

and intentional exclusion of any group or groups of citizens from the prospective jury lists." (*People v. White* (1954) 43 Cal.2d 740, 749.) This policy is embodied in California statutes, which direct courts to select juries "at random from the population of the area served by the court," and give "all qualified persons . . . an equal opportunity" to serve. (Code Civ. Proc.,[12] § 191.)

Jury selection is "random" if it "occurs by mere chance indicating an unplanned sequence of selection where each juror's name has substantially equal probability of being selected." (§ 194, subd. (*l*).) Section 222 describes the procedures a court should follow to ensure a jury is randomly selected: "(a) Except as provided in subdivision (b), when an action is called for trial by jury, the clerk shall randomly select the names of the jurors for voir dire, until the jury is selected or the panel is exhausted. [¶] (b) When the jury commissioner has provided the court with a listing of the trial jury panel in random order, the court shall seat prospective jurors for voir dire in the order provided by the panel list."

While "procedures that unnecessarily narrow the jury pool are disfavored" (*People v. Mayfield* (1997) 14 Cal.4th 668, 729, abrogated in part on another ground in *People v. Scott* (2015) 61 Cal.4th 363), "minor deviations from the statutory procedure" for random jury selection do not justify reversal (*People v. Visciotti* (1992) 2 Cal.4th 1, 38). Accordingly, a party "may not claim error on appeal if the procedure utilized in jury selection did not depart materially from the statutory procedures established to further the purpose of random selection." (*Ibid.*) We review a claim of

---

[12] Statutory references that follow are to the Code of Civil Procedure unless stated otherwise.

impropriety in the jury selection process de novo except to the extent the trial court relied on factual findings, which we will uphold if supported by substantial evidence. (*People v. Ramos* (1997) 15 Cal.4th 1133, 1154.)

The parties here agree the trial court was provided a list of prospective jurors as described in section 222, subdivision (b), that is, a listing in random order. Plaintiffs argue that by deviating from the order in the list and seating first those 14 jurors who had at least ten days of jury service available, the trial court violated section 222. Defendant counters that plaintiffs forfeited this contention by allowing the case to go forward with 11 jurors when they could have opted for a mistrial and that, in any event, the trial court's process was lawful and plaintiffs suffered no harm from it.[13]

Plaintiffs are right to assert the trial court's procedure did not comply with section 222, subdivision (b)—the trial court did not seat the jurors in the order listed. Nor did the trial court individually examine, even in perfunctory fashion, those jurors who were higher on the list than the 14 the court initially selected in order to ask whether serving on the jury would be a hardship for them. (See *People v. Burgener* (2003) 29 Cal.4th 833, 861-862 [reversal unwarranted, even though procedure "may not constitute the best practice," where trial court excused jurors after inquiring whether jury service would create a hardship "and, if the juror said it would, did not inquire further"].)

Nevertheless, we do not believe the trial court's process was a material departure from section 222. The list of 45 jurors the

---

[13] We proceed directly to a discussion of the merits because we find the forfeiture argument meritless.

trial court used was undisputedly a random list of individuals eligible for jury service, and as in *Visciotti*, this militates in favor of a finding there was no material variance from section 222. (*People v. Visciotti*, *supra*, 2 Cal.4th at p. 40 [no material departure from section 222 where there had not been "a complete abandonment of random selection" and 12 jurors selected by judge to be initially seated were originally part of a random draw].) Particularly relevant to our conclusion is the indication in the record that the trial court chose to employ the procedure it did because there was insufficient time to obtain a jury panel that was pre-qualified to serve during a two-week trial. The practice by which a jury commissioner "time qualifies" jurors (i.e., determines jurors who are presumptively able to serve on a jury for an expected length of time) is a fairly common and accepted practice. (See generally *People v. Eubanks* (2011) 53 Cal.4th 110, 129 [jury commissioner ensured prospective jurors were time qualified to sit through a 10–week jury trial]; *People v. Burgener*, *supra*, 29 Cal.4th at p. 856 [referencing "time-qualified" jurors].) That the trial court itself attempted to approximate this time qualification screening by looking to the jurors' available days of service was perhaps imperfect but not a material departure from well-accepted selection procedures. (See *People v. Burgener*, *supra*, 29 Cal.4th at p. 862 ["We have repeatedly rejected any claim that a trial court's policy of freely excusing prospective jurors for financial hardship deprives a defendant of his right to a fair and impartial jury"].)

Even if the trial court's procedure were seen as a material departure from section 222, the noncompliance did not prejudice plaintiffs. To establish grounds for reversal, plaintiffs must at least be able to make out a prima facie case that the jury selected

ran afoul of the constitutional fair-cross-section requirement. (*People v. Visciotti*, *supra*, 2 Cal.4th at p. 41 ["Not every departure from the state statutory procedure, even if deemed material, necessarily denies a defendant the constitutional right to a jury selected from a representative cross-section of the populace . . ."]; see also *id.* at p. 44 [reversal not required because nothing in the record "suggests the statutory violation in this case so skewed the jury selection process that the procedure was so 'inherently defective' as to be constitutionally invalid even without a showing that the jury actually chosen was not impartial"].) After all, the reason why the Code of Civil Procedure statutes require random selection of jurors is because random selection enables fulfillment of the substantive fair-cross-section-of-the-community guarantee. (§ 191 ["The Legislature recognizes that trial by jury is a cherished constitutional right, and that jury service is an obligation of citizenship. [¶] It is the policy of the State of California that all persons selected for jury service shall be selected at random from the population of the area served by the court . . ."]; *People v. Wright* (1990) 52 Cal.3d 367, 397–398 [parties constitutionally entitled to a jury that is as near an approximation of a cross-section of the community as the process of random draw permits], overruled on other grounds in *People v. Williams* (2010) 49 Cal.4th 405, 458-459.)

To make out a prima facie case of a violation of their right to a representative jury, plaintiffs must be able to show "(1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of

the group in the jury-selection process." (*Duren v. Missouri* (1979) 439 U.S. 357, 364; accord, *People v. Cunningham* (2015) 61 Cal.4th 609, 651-652; *People v. Rangel* (2016) 62 Cal.4th 1192, 1208.)

The "distinctive" group in the community plaintiffs allege the trial court excluded, as set forth in their opening brief, is the group of jurors with "lower income jobs who were unable to take the requisite time off work in favor of people with professional class jobs or those who did not work at all." The proposition that lower-paid workers are a cognizable group for the purposes of jury representation analysis is dubious but perhaps debatable. (Compare *Thiel v. Southern Pac. Co.* (1946) 328 U.S. 217, 221-224 [daily wage earners a cognizable class] with *People v. Burgener*, *supra*, 29 Cal.4th at p. 856 [low-income persons not a cognizable class]; *People v. Johnson* (1989) 47 Cal.3d 1194, 1214 [same].) But even assuming plaintiff's identified group constitutes a distinct class, they still have failed to show how that particular class was excluded by the court's pre-selection process. That is, plaintiffs have not satisfied the second prong of the prima facie test, which requires them to compare the percentage of lower-paid workers in the pre-selected group with lower-paid workers in the community and present evidence that the resulting ratio is not fair and reasonable.

Plaintiffs have made no effort to identify those among the pre-selected jurors that fall in their self-defined "lower income jobs" group. The pre-selected potential jurors stated their occupations, but that is insufficient evidence of their pay or of their financial or socioeconomic status. (See *People v. Carrasco* (2014) 59 Cal.4th 924, 958 ["Even assuming individuals who are poor constitute a cognizable group . . ., the fact that an employer

would not compensate an employee for at least 25 days of jury service . . . does not reveal any information about the prospective juror's financial status or demonstrate that he or she was poor"].) Nor have plaintiffs defined the relevant "community," i.e., whether it would be the 45-person jury pool from which the court preselected the initial 14 potential jurors to examine or some larger group. Indeed, the most plaintiffs' expert could muster on these points was the statement that the "group selected by [the trial court] would appear, for example, to be biased towards employees of larger companies, and towards retired persons." Not only does such a general statement of what "would appear" to be the case fail to suffice on its own terms, it also does not support plaintiffs' contention on appeal that *low-income workers* would be underrepresented as a result of the trial court's selection process. And the jury selected reflects significant occupational diversity: executives and homemakers, attorneys and students, a software engineer and a dishwasher.

Having said that, calling the prospective jurors for voir dire in the order specified on the jury panel list the trial court received, with at least some individualized examination of the jurors as to whether they would face a hardship if selected to serve, would have been the better practice. (See *People v. Burgener*, *supra*, 29 Cal.4th at p. 862; *People v. Thompson* (1990) 50 Cal.3d 134, 158 [Supreme Court does "not necessarily approve" of procedure adopted by the trial court for granting hardship exemptions].) But on this record, and regardless of whether the trial court strayed (materially or not) from the

statutory guidelines, the jury selection process employed does not warrant reversal.[14]

B. Juror Misconduct

A juror commits misconduct where an "overt event is a direct violation of the oaths, duties, and admonitions imposed on actual or prospective jurors, such as when a juror conceals bias on voir dire, consciously receives outside information, discusses the case with nonjurors, or shares improper information with other jurors . . . ." (*In re Hamilton* (1999) 20 Cal.4th 273, 294 (*Hamilton*).) Juror misconduct, when found, raises a presumption of prejudice that may be rebutted "by an affirmative evidentiary showing that prejudice does not exist or by a reviewing court's examination of the entire record to determine whether there is a reasonable probability of actual harm to the complaining party resulting from the misconduct. [Citations.]" (*Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 417 (*Hasson*); see also *Hamilton*, *supra*, 20 Cal.4th at p. 296 [verdict will not be reversed for jury misconduct if, based on review of entire record, there is no substantial likelihood one or more jurors were actually biased].)

When a party seeks a new trial by reason of jury misconduct, the trial court undertakes a three-step inquiry. First, it must "'determine whether the affidavits supporting the

---

[14] We do not reach plaintiffs' contention that they were wrongly deprived of a peremptory challenge when selecting the alternate jurors. Plaintiffs forfeited that argument by failing to raise a contemporaneous objection in the trial court. (*People v. Johnson* (1993) 6 Cal.4th 1, 23.)

motion are admissible. (Evid. Code, § 1150.)' [Citation.] This, like any issue of admissibility, we review for abuse of discretion.[15] [Citation.] [¶] Second, 'If the evidence is admissible, the trial court must determine whether the facts establish misconduct. [Citation.]' [Citation.] . . . On review from a trial court's 'determin[ation of] whether misconduct occurred, "[w]e accept the trial court's credibility determinations and findings on questions of historical fact if supported by substantial evidence. [Citations.]"' [Citations.] [¶] "'Lastly, assuming misconduct, the trial court must determine whether the misconduct was prejudicial." [Citation.]' [Citation.]" (*Barboni v. Tuomi* (2012) 210 Cal.App.4th 340, 345.)

1. Pre-deliberation communication

Plaintiffs make two related juror misconduct arguments that we will separate for purposes of analysis: that juror Passaseo translated evidence and jury deliberations into Spanish for juror Miranda, and that some of this translation or discussion of the case occurred during lunchtime conversations before the case was submitted to the jury for decision. We address the latter argument first, and we assume for purposes of our discussion that the relevant portions of the juror declarations the trial court struck on evidentiary grounds were instead admitted.

---

[15] Citing *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 535, plaintiffs contend we should adopt a de novo standard of review for evaluating the admissibility of juror affidavits. Our conclusions regarding plaintiffs' juror misconduct arguments are unaffected by which standard of review applies.

Juror declarations submitted by plaintiffs attested to witnessing pre-deliberation conversations between juror Passaseo and juror Miranda about the case, sometimes including juror Fischbach as well. Juror Miranda's declaration stated she "discussed the case" with Passaseo and Fischbach and "[Passaseo] translated the testimony and the evidence for me." Juror Martinez reported she regularly went to lunch with jurors Passaseo, Fischbach, and Miranda and they would "talk about the case in Spanish." Juror Didvar-Saadi reported she also witnessed Passaseo, Fischbach, and Miranda "talking in Spanish about the case" at lunch a couple times. Didvar-Saadi recounted a specific comment she claimed juror Fischbach made during one lunchtime conversation: "Can you believe they want $7 million and the other end wants a half million?" The counter-declaration defendant submitted from juror Passaseo acknowledged she had lunch with Miranda during trial and made "a few comments about the case to each other, but never to any level of detail." Passaseo also maintained she "followed the rules given to us."

After considering the competing declarations, the trial court concluded a new trial was not warranted because none of "the discussions here in the credible evidence[,] to the extent[ ] it would be considered by this court[,] suggests that there was any impropriety." We defer to the trial court's finding, predicated on its assessment of credibility, that there was no misconduct warranting reversal. (*Barboni v. Tuomi*, *supra*, 210 Cal.App.4th at p. 345; *City of Pleasant Hill v. First Baptist Church* (1969) 1 Cal.App.3d 384, 430.) That is to say, the trial court at least impliedly (if not expressly, with its reference to "credible evidence") credited juror Passaseo's statement that she "followed the rules" over the claims in the Miranda and Didvar-Saadi

declarations to the contrary, and that is a judgment we are not inclined to second-guess. To be sure, Passaseo's own declaration did concede, as all the other declarations stated, she made comments about the case during lunch. But at that level of generality, Passaseo's declaration was not an admission of misconduct: the comments or discussion about the case could have taken various forms that would be entirely unobjectionable—for instance, what the attorneys were wearing, whether the trial judge was a likeable fellow, or how long the trial would last. Nothing therefore prevented the trial court from crediting Passaseo's declaration over the others to conclude there had been no impropriety warranting a new trial.

2. Translation during deliberations

In analyzing plaintiffs' related misconduct argument, that juror Passaseo engaged in misconduct during deliberations by translating evidence and juror discussion into Spanish for juror Miranda, and occasionally for juror Fischbach too, we again assume for argument's sake the portions of the juror declarations the trial court struck were instead admitted. Even on such an assumption, there is no basis for ordering a new trial.

Plaintiffs have not carried their burden to show juror Passaseo, or jurors Miranda and Fischbach, engaged in misconduct warranting a new trial because there is no evidence to suggest any such translation provided was inaccurate. (*People v. Marshall* (1990) 50 Cal.3d 907, 949 [the defendant, the party claiming misconduct, "must show misconduct on the part of a juror"].)

One or more jurors in this case, including juror Martinez who provided a declaration for plaintiffs, understood Spanish.

None complained Passaseo's discussions in Spanish mischaracterized the evidence or the jurors' discussions, or included extraneous information that was not presented at trial. Even Miranda herself, a juror who voted in defendant's favor but provided a declaration in support of plaintiffs' new trial motion, related no accusation, or even a suspicion, that Passaseo's claimed translation left her with a misimpression of the evidence or the jury deliberations. Without at least *some* indication (a mere assertion in an appellate brief does not count) that the asserted translation activity resulted in Miranda or Fischbach having an understanding of the evidence or discussions that differed from the other jurors, we will not conclude plaintiffs carried their burden to establish juror misconduct. (See *People v. Moreno* (2011) 192 Cal.App.4th 692, 703-704, 707 [no error where court provided Spanish language interpreter to juror "for use throughout the trial and deliberations"].)

Indeed, it is the absence of such an indication that distinguishes this case from the misconduct-in-translation case relied on by plaintiffs, *People v. Cabrera* (1991) 230 Cal.App.3d 300 (*Cabrera*), as well as authority derivative of *Cabrera* they also cite, *People v. Gonzales* (2008) 165 Cal.App.4th 620 (*Gonzales*) and *People v. Cardenas* (2007) 155 Cal.App.4th 1468 (*Cardenas*). In *Cabrera* there was evidence—in fact, no dispute—that the particular juror alleged to have engaged in misconduct vouched for a definition of a foreign-language word or phrase that differed from the official court interpreter translation, which necessarily meant the jurors were relying on different understandings of the evidence. (*Cabrera*, *supra*, at p. 302 [juror told fellow jurors the defendant said he had "pushed" the victim when testifying in Spanish rather than "touched" her, as the

interpreter translated his testimony].) The other two cases plaintiffs cite, *Gonzales* and *Cardenas*, are not juror misconduct cases at all; they simply cite *Cabrera* for the proposition that it is misconduct for a juror to rely on her own translation instead of the official court translation. (*Gonzales*, *supra*, at p. 625, fn. 7; *Cardenas*, *supra*, at p. 1472, fn. 4.) Because plaintiffs provided nothing in their new trial motion that would suggest Passaseo's conduct was akin to the conduct of the juror in *Cabrera*, their translation misconduct claim fails.[16]

3. Juror La Grua and the standard of proof

Relying on their juror declarations that aver jury foreperson La Grua interpreted the jury instructions during deliberations and told the other jurors they needed 100 percent hard evidence to find defendant liable, plaintiffs argue juror La Grua committed misconduct by "provid[ing] an erroneous instruction on the law governing how the evidence was to be evaluated by the jurors." Unlike our analysis of plaintiffs' juror misconduct claims thus far, here we find it appropriate to address first the question of whether the trial court was correct to strike the relevant portions of the Martinez, De Santos, and Didvar-Saadi declarations concerning La Grua's statements during the deliberations. Put simply, the trial court was right.

---

[16] Plaintiffs also argue for reversal on the ground that juror Miranda's comprehension of English was so lacking as to make her unsuitable for jury service. (See § 203.) They forfeited the argument when they failed to challenge Miranda's suitability during jury selection. (*People v. Moreno*, *supra*, 192 Cal.App.4th at pp. 706-707.)

"Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict *or concerning the mental processes by which it was determined*." (Evid. Code, § 1150, subd. (a), italics added.) Thus, "with narrow exceptions, evidence that the internal thought processes of one or more jurors were biased is not admissible to impeach a verdict." (*Hamilton*, *supra*, 20 Cal.4th 273 at p. 294; see also *In re Stankewitz* (1986) 40 Cal.3d 391, 398 (*Stankewitz*) [evidence of juror statements during deliberations "must be admitted with caution" because they "have a greater tendency than nonverbal acts to implicate the reasoning processes of jurors—e.g., what the juror making the statement meant and what the juror hearing it understood"].) "[W]here a verdict is attacked for juror taint, the focus is on whether there is any *overt* event or circumstance, 'open to [corroboration by] sight, hearing and the other senses' ([*People*] *v. Hutchinson* [1969] 71 Cal.2d [342], 350), which suggests a *likelihood* that one or more members of the jury were influenced by improper bias." (*Hamilton*, *supra*, at p. 294.)

In ruling on the new trial motion, the trial court emphasized it had correctly instructed the jury on the applicable burden of proof when it read the instructions aloud to the jury before they began deliberations. The court determined that the statements La Grua allegedly made regarding plaintiffs' burden of proof were his personal interpretation of the evidence and/or

jury instructions, and that his statement about "hard evidence" was part of the deliberative process. We are of the same view.

Evidence Code section 1150 renders inadmissible statements concerning the mental process that jurors used to arrive at a verdict, and La Grua's understanding or application of the instructions is precisely that. Plaintiffs do not argue, nor is there any evidence, that La Grua's view on what plaintiff must prove was predicated on any extraneous legal source or expertise, or that he was simply refusing to follow the court's instructions. Rather, the declarations submitted by plaintiffs sought to report on what La Grua, having been instructed on the applicable law by the court, believed necessary to find in plaintiffs' favor (or, perhaps, sought to report on his rhetorical efforts to persuade other jurors). Declarations of this sort are inadmissible. (*Mesecher v. County of San Diego* (1992) 9 Cal.App.4th 1677, 1684 ["[T]he alleged misconduct arose from the way in which the jury interpreted and applied the instructions. Such evidence is inadmissible"]; *United States v. Stacey* (9th Cir. 1973) 475 F.2d 1119, 1121 ["It is true that some jurors had the knowledge which would enable them to testify, objectively, of incidents tending to indicate that other jurors may have misunderstood the court's instructions on the elements of the offense. However, the inquiry would still concern the mental processes by which the jurors reached their decision and would therefore be barred by the nonimpeachment rule"].) We are convinced that accepting plaintiffs' declarations concerning how La Grua interpreted or applied the court's instructions, and how that may have affected jury deliberations, would represent an unprecedented intrusion

into the deliberative process of juries.[17] We will not countenance that.

With the relevant statements in the Martinez, De Santos, and Didvar-Saadi declarations properly excluded, that leaves only the declaration of juror Griffith, the admissibility of which the trial court never decided. Paragraph five of juror Griffith's declaration is the relevant portion that concerns La Grua's conduct and it states as follows: "[Juror La Grua] interpreted the jury instructions to the jurors. La Grua insisted that there was no evidence presented that . . . Rivera ate Foster Farms chicken. I told him that . . . Rivera's testimony is evidence in a civil trial. [La Grua] insisted it might be evidence but it is not proof. I told him in a civil case the standard of proof is different than in a criminal case. Several of the other jurors stated that they

---

[17] The circumstances in the case chiefly relied on by plaintiffs, *Stankewitz*, *supra*, 40 Cal.3d 391, were different, and different in a way that convinced that court its holding would not compromise the reasoning process of jurors. (*Id.* at p. 398 [testimony about statements made during deliberations "must be admitted with caution"].) In that case, a juror engaged in misconduct by misinforming other jurors on the law relevant to one of defendant's criminal charges, "vouching for its correctness on the strength of [the juror's] long service as a police officer." (*Id.* at pp. 399-400.) It is this aspect of *Stankewitz*—the juror's invocation of his extraneous expertise and knowledge as a police officer to advance an understanding of the law contrary to the court's instructions—that constituted the misconduct. There is nothing similar here. At most, plaintiffs' declarations reveal La Grua misunderstood the court's instructions; they do not show La Grua relied on some outside source or expertise to effectively countermand them.

believed . . . Rivera's testimony but accepted . . . La Grua's argument that her testimony was not proof."

This paragraph merely reinforces our determination that the misconduct claim concerning juror La Grua impermissibly seeks to intrude on the jury's deliberations; it too should have been stricken as inadmissible under Evidence Code section 1150. But even considering the paragraph on its own terms, it discloses no misconduct. Rather, it discloses a robust debate about whether Rivera's testimony was sufficient proof to hold defendant liable, which is just what the jury should have been debating.

4. Alleged misconduct by Juror Fischbach

Where a juror imparts information to the jury that is extraneous to the evidence presented at trial, "the verdict will be set aside only if there appears a substantial likelihood of juror bias," which is established where the extraneous information "is so prejudicial in and of itself that it is inherently and substantially likely to have influenced a juror" or "if, from the nature of the misconduct and the surrounding circumstances, the court determines that it is substantially likely a juror was 'actually biased' against the [losing party]." (*Nesler*, *supra*, 16 Cal.4th at pp. 578-579.) Juror Fischbach's statement about her daughter contracting *Campylobacter* in Mexico does not establish a substantial likelihood of bias. One of *plaintiffs*' experts at trial testified that travel to underdeveloped countries was a potential source of *Campylobacter*, but there was no evidence Rivera travelled abroad immediately prior to contracting her infection. Defendant never argued otherwise. Thus, even if declarations recounting Fischbach's remark regarding her daughter's travel were admissible, the remark had no bearing on the case and

cannot constitute prejudicial misconduct. It was not "extraneous knowledge" that would cause her or her fellow jurors "to render a verdict that was not based solely upon the evidence presented in court." (*Id.* at p. 583.)

Two of plaintiffs' declarants, jurors Martinez and Didvar-Saadi, also stated juror Fischbach announced her intention not to vote for plaintiffs at the very outset of deliberations. The trial court struck the relevant paragraph of Didvar-Saadi's declaration and expressed concerns with the relevant paragraph of Martinez's declaration; the court also found, regardless, that the alleged statement by Fischbach was not improper. We agree on both counts. The declarations on this point, which concern how the jurors began their deliberations, were inadmissible under Evidence Code section 1150. In addition, it is not misconduct (though it is inadvisable purely as a matter of group decision dynamics) for a juror to state his or her views, even in definitive terms, at the outset of deliberations.

5. Alleged concealment by Juror Easton during voir dire

The statements reportedly made by juror Easton during deliberations—to the effect that she believed it is "wrong" to sue and plaintiff was only suing to make money—do not warrant a new trial. Plaintiffs claim juror Easton committed misconduct by concealing these views during voir dire, but the record demonstrates the opposite. When examined during voir dire, Easton admitted she "ha[d] a very different feeling towards the American [judicial] system," she had been raised to avoid blaming others, and she would hesitate to sue a company like Foster Farms even if she believed she or a family member were

sickened by eating its chicken. There was no improper concealment by Easton, whom plaintiffs did not challenge for cause when examined on voir dire.

C. Exclusion of Evidence

We review the trial court's exclusion of evidence relating to defendant's handling of *Salmonella* issues and receipt of USDA noncompliance reports for abuse of discretion. (See, e.g., *People v. Davis* (2009) 46 Cal.4th 539, 602 [evidentiary rulings based on Evidence Code sections 352 and 1101 reviewed for abuse of discretion]; *Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 281 [abuse of discretion standard particularly appropriate for evidentiary rulings based on relevance].) Plaintiffs bear the burden of establishing the court exceeded its discretion, and that the error resulted in a miscarriage of justice. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 566; accord, *Kim v. True Church Members of Holy Hill Community Church* (2015) 236 Cal.App.4th 1435, 1449; see also Evid. Code, § 354 [judgment shall not be reversed for erroneous exclusion of evidence without resulting miscarriage of justice]; § 475 [improper ruling does not warrant reversal of judgment unless "a different result would have been probable if such . . . ruling . . . had not occurred or existed"].)

Plaintiffs argue the trial court erred in excluding all evidence relating to *Salmonella* and to sanitation conditions at defendant's plants because defendant's conduct in regard to each of those issues could be linked, and was therefore relevant, to the prevalence of *Campylobacter* in its chickens in 2011. While defendant's handling of *Salmonella* and sanitation issues might have some bearing upon plaintiffs' theory of the case, Evidence

Code section 352 affords trial courts latitude to exclude evidence even if it is relevant. The trial court did not exceed the scope of that latitude in this case.

Plaintiffs' theory of liability was predicated on a *Campylobacter* infection that occurred in late 2011. The trial court acted well within its discretion, therefore, when it excluded evidence relating to a *Salmonella* outbreak only years later in 2013 and 2014. Nor did the court err in excluding other evidence relating to *Salmonella* during the time period closer to when Rivera got sick. Defendant introduced evidence to show the absence of a correlation between how *Salmonella* and *Campylobacter* are transmitted among chickens and between the treatment measures designed to kill each type of bacteria. Plaintiffs contend defendant's evidence did not show a complete lack of correlation regarding the prevalence of the two forms of bacteria. But even if plaintiffs are correct, the trial court had discretion to generally exclude evidence relating to *Salmonella* because it risked confusing or misleading the jury and, in order to avoid such confusion, would require a substantial amount of time to address how *Salmonella* and *Campylobacter* bacteria were similar to and different from one another and to what extent these comparisons mattered.

The trial court was also within its discretion when it excluded evidence relating to general unsanitary conditions at defendant's chicken processing plants. It was reasonable for the court to deem noncompliance reports referring to a cockroach found in a cup of coffee and a worker using her boots to gather chicken wings on the plant floor as substantially more prejudicial than probative. While evidence relating to fecal matter on defendant's chickens was arguably relevant to plaintiffs' case, the

court could reasonably find it was of marginal probative value and cumulative in light of the evidence plaintiffs were allowed to present concerning how easily fecal material was spread during the process of transporting and processing chickens as a general matter.

We further hold that the trial court's exclusion of the *Salmonella* evidence and the noncompliance reports did not, in any event, result in a verdict constituting a miscarriage of justice. (Cal. Const., art. VI, § 13; Evid. Code, § 354.) Plaintiffs provided ample evidence, including undisputed evidence, that defendant's processing procedures and facilities were not perfect and that a significant amount of chicken left its facilities infected with *Campylobacter*. One of plaintiffs' experts showed a slide presentation indicating the many ways by which defendant's procedures likely contributed to the spread of *Campylobacter* in and among its chickens, and that presentation included photographs and other depictions suggesting the conditions of chicken processing plants like defendant's were not entirely sanitary. Furthermore, plaintiffs provided specific evidence that a higher than average number of infected chickens left defendant's plants for stores—potentially including the stores at which Rivera shopped—during the time period in which Rivera might have bought the chicken that likely infected her. Thus, it is not reasonably probable that admission of evidence regarding general *Salmonella* and sanitation issues at defendant's plants would have resulted in a more favorable outcome. (*California Crane School, Inc. v. National Com. for Certification of Crane Operators* (2014) 226 Cal.App.4th 12, 24.)

DISPOSITION

The judgment is affirmed. Respondent is to recover its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAKER, J.

We concur:

TURNER, P.J.

KUMAR, J.*

---

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.